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No. 06-739

In the Supreme Court of the United States

WALTER W. KELLEY, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF RICKY WAYNE BRACEWELL,

Petitioner,

v.

RICKY WAYNE BRACEWELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, Susan Block-Lieb, Ralph Brubaker, Jonathon C. Lipson, Nancy B. Rapoport, Robert K. Rasmussen, David Arthur Skeel, and Charles J. Tabb (the "*Amici*") hereby request leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the Court of Appeals for the Eleventh Circuit. Petitioner Walter W. Kelley has consented to the filing of this brief. Respondent Ricky Wayne Bracewell has not consented.

As set forth in the accompanying brief, the *Amici* are professors of law and have a deep interest in their proper interpretation and application of the bankruptcy laws. The Amici filed an amicus brief in *Burgess v.* Sikes, 438 F.3d

493 (5th Cir. 2006), concerning the same issued decided in the present case.

The *Amici* are greatly concerned that the Eleventh Circuit's incorrect interpretation of the Section 541(a) of the Bankruptcy Code, 11 U.S.C. §541(a), results in a limitation on the breadth of the term "property of the estate", which in turn limits the funds available to creditors of the debtor's estate and frustrates one of the primary bankruptcy policies of maximizing the debtor's estate for the benefit of creditors. Accordingly, the *Amici* respectfully request leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2]

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[1] This brief has been prepared *pro bono*. Pursuant to Rule 37 of the Rules of this Court, the *Amici* file this brief with the written consent of both parties, which are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The *Amici* are Susan Block-Lieb, Professor of Law, Fordham Law School; Ralph Brubaker, Professor of Law and Associate Dean for Academic Affairs, University of Illinois College of Law; Jonathon C. Lipson, Associate Professor of Law, Temple University, James E.

They are deeply interested in this case because of the import[illegible] effect its outcome could have on the scope of property [illegible] a debtor's bankruptcy estate. The *Amici* file this *pro bono* brief to offer what assistance they can to the Court as it considers and decides whether the plain language of the Bankruptcy Code and longstanding precedents of this Court require that crop disaster payments paid on account of prepetition crop losses pursuant to postpetition legislation be included in the estate as property of the debtor as of the date on which the debtor's bankruptcy case was commenced.

In supporting Petitioner and seeking reversal of the decision of the Circuit Court, the *Amici* urge the Court to hold that the crop disaster payments are property of the estate under 11 U.S.C. §541(a)(6) as proceeds of the Debtor's property interest under 11 U.S.C. §541(a)(1) in the losses the debtor incurred before bankruptcy. This brief focuses on the statutory language of 11 U.S.C. §541(a) and the precedents of this Court, some of which predate the enactment of the Bankruptcy Code, and argues that those precedents continue to be controlling.

SUMMARY OF ARGUMENT

A debtor has a property interest in losses that are suffered prepetition. The Bankruptcy Code expressly provides in §541(a)(1) that all legal and equitable interests of the debtor in property as of the commencement of the bankruptcy case become property of the estate. The

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Beasely School of Law; Nancy B. Rapoport, Professor of Law, University of Houston Law Center; Robert K. Rasmussen, Milton Underwood Chair in Law, Vanderbilt University Law School; David Arthur Skeel, S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania Law School; and Charles J. Tabb, Alice Curtis Campbell Professor of Law, University of Illinois College of Law.

Bankruptcy Code further provides in §541(a)(6) that proceeds, product, offspring, rents, or profits of or from property of the estate also constitute property of the estate. Therefore, any payments, even those made after the bankruptcy filing, made on account of the prepetition losses incurred by the debtor are proceeds of those losses and constitute property of the estate.

This is in accord with the reasoning and holdings of long established precedents of this Court that a loss can itself have value and that party owns an interest in losses that it has suffered, even if there is no means of recompense at the time the loss is incurred. These precedents, while construing similar provisions of the Bankruptcy Act, the predecessor to today's Bankruptcy Code, retain their precedential value. Indeed, when Congress enacted the broad property provisions of §541(a), it gave no indication that it intended to depart from the established precedents and did not write on a clean slate.

In its decision, the Circuit Court wrongly restricted the plain meaning of property to only legal interests. In doing so it failed to give the proper recognition to the equitable interest that the Debtor held in the crop loss that he suffered prepetition. This crop loss resulted in the creditors' claims that the debtor sought to discharge in bankruptcy while retaining for himself the government reimbursement for those losses. The Circuit Court also wrongly held that this Court's precedents determining what constitutes property in the context of a bankruptcy estate under the Bankruptcy Act, do not apply under the Bankruptcy Code, even though Congress expressly made clear its intent to expand the concept of property when adopting §541(a).

ARGUMENT

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE REQUIRES THAT ALL PROPERTY, UNLESS SPECIFICALLY EXCLUDED, BE INCLUDED IN THE DEBTOR'S BANKRUPTCY ESTATE.

The plain language of §541(a) of the Bankruptcy Code determines the outcome of this case. Section 541(a) provides that

> [t]he commencement of a case . . . creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interest of the debtor in property as of the commencement of the case.

The statute means what it says; the estate is comprised of all property unless excluded by other subsections of §541. No such exclusion is relevant to this case. Thus, unless specifically excluded, any property, whether it be legal or equitable, that the debtor held prior to the commencement of the bankruptcy case becomes property of the estate. When enacting §541(a)(1), Congress stated that "[t]he scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act §70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act." H.R.Rep. No. 95-595, p. 367 (1977; S.Rep. No. 95-989, p. 82 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5868, 6323.

This broad interpretation of §541(a) is correct when viewed in light of other Bankruptcy Code provisions. For

various reasons Congress wrote §§541(b) and (c)(2) to except certain types of property from being property of the estate; property that otherwise would have been included as property of the estate under §541(a). Similarly, §522 of the Bankruptcy Code exempts certain types of property from liability for prepetition debts. *Owen v. Owen*, 500 U.S. 305, 308 (1991). "No property can be exempted [from the estate](and therefore immunized [from creditors' claims]), however, unless it first falls *within* the bankruptcy estate." *Id.* Therefore, property of the estate is so broad that it even includes property that is exempt from creditors' claims. *Stinnet v. Laplante (In re Stinnet)*, 465 F.3d 309, 313 (7th Cir. 2006).

Furthermore, even overencumbered property is included in property of the estate. *See Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (finding that a vehicle worth $4,000 and encumbered by a lien in the amount of $4,894.89 was property of the estate). Accordingly, even property that is burdensome to the estate or that is of inconsequential value to the estate constitutes estate property. *See* 11 U.S.C. §554(a) (providing that a trustee may abandon property of the estate in certain circumstances). When considered in reference to these other sections of the Bankruptcy Code, it is clear that all interests are included in the bankruptcy estate; except those specifically excluded in §541(b).

In *Bracewell v. Kelley*, the Eleventh Circuit failed to apply the plain meaning of the statutory text. Instead of recognizing that all legal or equitable interests are included in property of the estate, the Circuit Court focused its analysis on whether the Debtor had a remedy or a right to be compensated for the loss he suffered at the time he commenced his bankruptcy case, *i.e.* whether the debtor had a then-existing claim upon which he could have

brought suit. The court stated that "[n]ot until the enactment of the legislation elevated Bracewell's hope to *an entitlement* did it become an interest cognizable under §541(a)(1)." *Bracewell v. Kelley*, 454 F.3d 1234, 1239 (11th Cir. 2006) (emphasis added). The court went on to hold that "we look to state law to determine when a *claim* arises, and if it arises on or before the commencement of the bankruptcy case, it is part of the bankruptcy estate." *Id.* at 1242 (emphasis added). Finally, the court found that "[t]he crop loss was the result of an act of nature and by itself did not give rise to a *claim* against anyone. Bracewell had no right to be compensated until Congress enacted the legislation giving him a *right* and that did not occur until after he had filed for bankruptcy." *Id.* at 1244 (emphasis added).

The emphasized words above show that the Circuit Court clearly failed to apply the plain language of §541(a)(1). The statute does not require the debtor to have an existing claim; what is required is an interest, either legal or equitable. The Circuit Court equated an interest with the availability of compensation or a remedy. However, the Bankruptcy Code distinguishes the right to compensation or remedy by defining that right as a claim. 11 U.S.C. §101(5) defines a claim as a

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced

> to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Property, as used in §541, is thus not limited to rights to compensation or remedies. Rather, it is significantly more broad than simply a claim.

This Court should grant the Petition for Writ of Certiorari to resolve the Circuit Court's disregard for the clear requirements of the Bankruptcy Code that all property of a debtor, including property for which there is no value as of the commencement of the bankruptcy case, such as a crop loss, are property of the estate. A ruling by this Court would provide guidance as to the correct interpretation of the Bankruptcy Code and define the proper limits of property of the estate to the parameters intended by Congress; that all property of the debtor is included within property of the estate. By limiting the meaning of "property" to a right to compensation or a remedy, the Eleventh Circuit established a precedent that contingent property that is not presently capable of liquidation should not be included in a debtor's estate; even if it might prove to be of significant value in the future. This holding frustrates the goal of bankruptcy of maximizing the estate for future distribution to creditors.

II. SUPREME COURT PRECEDENTS REQUIRE THAT THE DEBTOR'S INTEREST IN THE CROP LOSS BE INCLUDED IN THE DEBTOR'S BANKRUPTCY ESTATE.

A. There are long-standing decisions of this Court that broadly interpret the term property.

Long standing precedents of this Court have interpreted the term "property" broadly when used in the context of a bankruptcy statute. The Bankruptcy Code itself does not

suggest that "property" should be understood in a special or narrow sense; on the contrary, the use of the term "all" counsels in favor of a broad interpretation. *Cf. Precision Industries v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 545 (7th Cir. 2003) (broadly interpreting the term "interest in such property" as used in §363(f) to include successor liability). The Circuit Court, however, held, without explanation, that this Court s precedents interpreting the term "property" are not binding after the enactment of the current Bankruptcy Code. Indeed, those precedents apply even more strongly within the Bankruptcy Code than under the earlier Bankruptcy Act because Congress intended §541(a) to broadly expand the size of estate property. Moreoever, the Circuit Court was incorrect in its narrow views of the scope of estate property under the former Bankruptcy Act.

In *Segal v. Rochelle*, this Court broadly interpreted §70a of the Bankruptcy Act, the precursor to §541 of the Bankruptcy code, stating that

> [t]he main thrust of §70a(5) is to secure for creditors everything of value that bankrupt may possess in alienable or leviable form when he files his petition. *To this end the term 'property' has been construed most generously* and an interest is not outside its reach because it is novel or contingent of because enjoyment must be postponed.

Segal v. Rochelle, 382 U.S. 375, 379 (1966) (emphasis added). Thus, property is a broad term, and encompasses all interest of the debtor.

In *Williams v. Heard*, 140 U.S. 529 (1891), a debtor suffered economic expense by paying enhanced war risk premiums during the Civil War. Subsequently the debtor

filed for bankruptcy. After the commencement of the bankruptcy case, by an act of Congress certain funds were made available to those entities that incurred the expense of enhanced premiums during the war. While the debtor had incurred expenses on account of these enhanced premiums, as of the date that he commenced his bankruptcy case he did not have "as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim." *Id.* at 538. This Court continued, finding that as of the time of his bankruptcy, "the claimant was remediless with respect to any proceeding which he might be able to retrench his losses." *Id.* at 540. Nonetheless, this Court held that the payments under the post-bankruptcy act of Congress were property of the debtor's bankruptcy estate, stating

> [t]here was thus at all time a possibility that the government would see that [the losses] were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the act of congress for the distribution of the fund. But the act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the act of congress did was to provide a remedy for the enforcement of the right.

Id. at 541. *Williams* makes clear that a loss constitutes property at the time of bankruptcy even thought there is no right to compensation or remedy until after the bankruptcy case is commenced. The Circuit Court was therefore

wrong in its conclusions that the crop loss could not constitute property of the estate.

Fifty years before deciding *Williams v. Heard*, this Court decided *Milnor v. Metz*, 41 U.S. 221 (1842), which the Circuit Court likewise erroneously declined to apply. In *Milnor*, the appellant, Milnor, commenced an insolvency proceding under a state statute pursuant to which an assignee for the benefit of his creditors was appointed to liquidate his "estate, effects and property" for distribution to creditors. Before commencing his insolvency proceeding, Milnor had worked for the government. Because of a congressional statute his duties had increased, and he accordingly requested Congress to pass a law compensating him for his additional services. Before Congress took any action on his request, Milnor filed his insolvency proceeding to obtain a discharge from his debts. Significantly, only after Milnor received his discharge in the proceeding did Congress pass the statute providing compensation for his additional prepetition services.

This Court held that the assignee in the insolvency proceeding was entitled to the payment made under the postpetition statute. This Court specifically rejected Milnor's contention that the chance of such a statute being enacted after he commenced his insolvency proceeding "was as uncertain as the pleasure of Congress," and that "until the [act of Congress] was passed no claim existed." Thus, at the time of filing his insolvency case, Milnor's only interest was an inchoate hope. This hope, however, was sufficient to be included as property of his insolvency estate and for the payment pursuant to the act of Congress to be proceeds of property of the insolvency estate.

Had the Circuit Court correctly applied the reasoning of *Segal*, *Williams*, and *Milnor*, to the present case, the court

would have held that the crop loss was property in which the Debtor had an interest. That interest became property of the estate upon the filing of the bankruptcy petition and the crop disaster payment constituted proceeds of the property, and thus property of the estate pursuant to §541(a)(6). The Circuit Court, however, attempted to distinguish these precedents because they pre-dated the enactment of the Bankruptcy Code. As shown above, the Circuit Court was wrong to distinguish these cases on those grounds because their precedential value was enhanced by Congress' broadening the scope of estate property under §541(a).

B. This Court's Bankruptcy Act decisions retain their precedential value when interpreting similar provisions of the Bankruptcy Code.

This Court's cases, cited above, broadly interpreting term property under the Bankruptcy Act, retain their precedential value in interpreting the same term under the Bankruptcy Code. "Congress could, of course, have intended a different interpretive method for reading terms used in the Bankruptcy Code it created in 1978. But if it had so intended we would expect some statutory indication." *U.S. v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 221 (1996) (noting that this Court's Bankruptcy Act practice of looking past the IRS label of an exaction as a tax, and determining whether the exaction was a tax for purposes of bankruptcy law, would continue under the Bankruptcy Code).

This Court found such a statutory indication in *United Bank v. Wolas*, 502 U.S. 151 (1991). In *Untied Bank* this Court was analyzing a preferential transfer under §547 of the Bankruptcy Code. The preference provision of the Bankruptcy Act was significantly narrower than under the

Bankruptcy Code. Accordingly, courts had developed the current expense rule to cover situations in which a debtor's payments on the eve of bankruptcy did not diminish the net estate because tangible assets were obtained in exchange for the payment. When Congress rewrote the preference provision in the Bankruptcy Code, it substantially enlarged the trustee's power to avoid preferential transfers. At the same time, Congress created a new exception for transfers made in the ordinary course of business. In light of these substantial changes in the preference provision, this Court held that Congress had made a deliberate choice to abandon the current expense rule.

By contrast, there was not a substantial change from §70a of the Bankruptcy Act and §541(a) of the Bankruptcy Code. In *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court held §541(a)(1) to encompass property that had been seized by a creditor before the debtor filed bankruptcy. This Court's interpretation, consistent with the broad interpretation of property under the Bankruptcy Act, eschewed a rigid limitation on §541(a)(1) and confirmed that Congress enacted at least as broad a definition of property in the Bankruptcy Code as pre-existed in the Bankruptcy Act.

The Circuit Court, nonetheless, held that "[t]he *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property" and that *Williams* and *Milnor* both "predate the adoption of the Bankruptcy Code, and the critical language that we are interpreting, by a century of so" and were therefore not entitled to precedential deference. *Bracewell*, 454 F.3d at 1242, 1244. The Circuit Court failed to acknowledge, however, that "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate'" *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992), and that the treatment of property under the

Bankruptcy Act informs the courts understanding of the language of the Code. *Cf. Kelly v. Robinson*, 479 U.S. 36, 48 (1986) (comparing a Bankruptcy Act statute disallowing discharge of criminal liability with a similar provision of the Bankruptcy Code).

The Circuit Court therefore wrongly dismissed this Court's precedents in *Segal*, *Williams*, and *Milnor* as no longer binding. Without these cases to guide its analysis, the court narrowly interpreted §541(a). Guidance is needed from this Court to provide the courts, debtors, and practitioners with a standard by which they can gauge the value of Bankruptcy Act precedents in interpreting similar provisions of the Bankruptcy Code.